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HAROLD B. WILLEY, Clerk

No. 394

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

IN THE MATTER OF APPLICATION OF BEN G. LEVY FOR ADMISSION TO PRACTICE IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals,
Fifth Circuit,

[redacted]

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To The United States Court of Appeals, Fifth Circuit,

and

BRIEF IN SUPPORT THEREOF

To the Honorable Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals, Fifth Circuit, entered in the above styled cause on June 23, 1954.

Citations to Opinions Below

The decision of the trial court appears in the Record (pp. 47-50), and the corrected decision of the Court below is reported in 214 Fed. 2d 331, and is printed in Appendix B hereto, *infra*, p. 13. Petition for Rehearing (64-68), filed on July 12, 1954, was overruled without written opinion (71).

Jurisdiction

The trial court's judgment was rendered on November 24, 1953 (47-50); the corrected opinion of the Court below was entered on June 23, 1954 (55-61), *infra*, p. 13. A timely Petition for Rehearing, filed on July 12, 1954 (64-70), was denied on July 20, 1954, without written opinion.

Jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1).

Question Presented

Is the right to practice law in the United States Court to be denied an otherwise acceptable person simply because he holds unorthodox views? *(Denying Petitioner admission to practice in the United States District Court constituted an abuse of discretion to the extent that it offends due process of law).*

Constitutional Amendments Involved

The constitutional provisions involved are the First Amendment, United States Constitution, and the Fifth Amendment, United States Constitution. They are printed in Appendix A hereto, *infra*, p. 12.

Statement

Petitioner, aged twenty-six, an honorably discharged veteran of the United States Navy in World War II, a native of New York, but now a citizen of Texas, was a member in good standing of the State Bar of Texas (7). In June, 1953, he applied for admission to the Bar of the United States District Court in Houston, Texas. His application conformed, in every particular, to the Rule covering such cases (3-7).

Acting according to the Rule, the Court referred the application to a Bar Committee of three members (47-48) for "investigation of the fitness, competency, and qualifications of the applicant" (48).

One member of this Bar Committee held *one* interview with Petitioner (10). The other members of this Bar Committee, at *no* time, confronted, interrogated, or in any way examined the Petitioner (10). Nevertheless, the Committee, through its Chairman, recommended against Petitioner (7-9). Petitioner excepted to the Committee's Report, and was granted a hearing by Judges Kennerly, Hannay and Connally, of the Houston Division, Southern District of Texas (9 ff). These United States Judges approved the Bar Committee's report, and denied Petitioner admission to the Bar of the Federal Court, but without prejudice against his applying again at the end of one year (50). The basis of the Committee's report, resulting from *one* interview by the Chairman, later approved by the aforesaid Judges, was that Petitioner was associated with an attorney, "who is *generally considered* to be a member of the Communist Party" (8). The facts developed *in open court* before the three mentioned Judges clearly establish that the "association" was as a low-salaried employee in said law office (17).

Petitioner had obtained this job as an impecunious young lawyer only after failing (during the present business recession) to find employment in several larger law firms, oil companies, and insurance companies (16). Although such accusation was made against Petitioner's employer by the Chairman of the Bar Committee *alone*, it was never established that such was true, the Bar Committee Chairman stating that he—meaning the employer *(not Petitioner)*—"is *generally considered* to be a member of the Communist Party". "He is regarded as a Communist openingly (sic) and also in publications." His "Communistic views" are "a matter of *common knowledge* to the Bar and to the newspapers" (8). Petitioner declares again and again (and wishes to be put under oath concerning all he says, 27), that *"I am not now and never have been a member of the Communist Party.* I don't believe in using force and violence to overthrow the Government, or to effect social change, and so I could never conceivably be such, a member of the Communist Party" (14, 43). He says, "I would classify my own political views as liberal, for which I make no apologies. I happen to be, as perhaps distinguished from the Chairman of the Committee, an admirer of Franklin Roosevelt. I voted for Harry Truman, and for Adlai Stevenson in the last campaign" (17, 30). He worked in campaign headquarters for Stevenson (29), and attended meetings of the Young Democrats (29). During the hearing in the trial court, he was questioned specifically about membership in various organizations, which revealed that he belonged to *nothing more subversive* than the Young Adult Professional Club at the YMCA, the Adult Group at the Jewish Community Center, the Young Democrats of Harris County, and the Emerson Group of the Unitarian Church (28-29). In college *(City College of New York)* he belonged to the

Concert Bureau, the Government and Law Society, and the Franklin Delano Roosevelt Young Democrats (42). When asked if he ever attended Communistic meetings, he told the Court that when he was a student in New York City, he had gone to a student meeting at which the late Congressman Marcantonio spoke (43), but no other such meeting.

Petitioner attends both the Temple Emanu El and the First Unitarian Church in Houston, and pledges a part of his income in the support of the latter (28). He believes in Divine Guidance (38). He does not "adhere to any orthodox point of view," but, he says, "I believe that there is a Supreme Being, but I wouldn't venture to say what the nature of that Supreme Being is" (45).

Petitioner thinks Franklin Delano Roosevelt was a great man (17), and quotes at length and with approval from Judge Learned Hand and Mr. Justice Douglas (19-27).

From questions by the trial judges it was developed, but apparently, not received warmly by the three Judges, that:

(A) Petitioner is interested in Civil Liberties (19, 21, 30);

(B) He thinks Houston is not a liberal-thinking and liberal-voting community (32-33);

(C) He thinks that, if a Communist were on trial, "it is highly unlikely that * * * a jury would be picked that would examine only the evidence produced during the trial, and not preconceptions toward Communists" (39).

The most dreadful thing that Petitioner ever did was to write President Eisenhower asking clemency for the Rosen-

bergs (30), because he does not believe in capital punishment (34, 41), and thought the death penalty in such case was unprecedented, and not justified by the evidence (30, 36-37). He says: "I am painfully aware that my views on this are probably identical with the majority of Communists; nevertheless, it is not because it is the Communist point of view that I am upholding it, *it is because it is mine*" (34).

Despite these statements and facts of the case, the trial court rejected Petitioner's application to practice in the United States Courts.

The Court below (55-61) completely ignored and refused to pass upon the constitutional issues and questions raised. It held, in effect, that Petitioner should recommit his same request to the *same* Bar Committee for a full hearing, one year later, as suggested by one of the trial Judges (59-60). Petition for Rehearing (64-68), urging the same issues herein, was overruled without written opinion (71).

The lower court in affirming the ruling of the trial court placed undue emphasis on the fact that admission to practice law was a "privilege" (60). In failing to squarely meet the constitutional issues and questions placed before the Court below, it completely disregarded the fact that while admission to practice law is often called a "privilege", it is one which may not be denied arbitrarily or on condition of the "surrender of rights derived from the Constitution" (WHEELING STEEL CORPORATION v. GLANDER, 337 U.S. 562, 571; and IN RE SUMMERS, 325 U.S. 561, 566). Likewise, the lower court disregarded the unquestioned principle that among the rights not to be surrendered which are appropriate to this matter are those incorporated

in Amendments One and Five, of the Constitution of the United States.

The Court below failed completely to recognize, although it was specifically pointed out, the limitation upon the exercise of the First and Fifth Amendments' freedoms resulting from the refusal of the trial court to permit Petitioner, a qualified and an acceptable person, to practice law in the United States Courts. The result of the Court failing to determine this cause upon its merits rather than on a procedural basis only, reinforced the application of an "unconstitutional condition", to the privilege to practice law in the United States Courts in Houston, despite the fact that Petitioner is a member in good standing of the State Bar of Texas.

Reasons for Granting the Writ

(1) The decision of the Court below in this cause, is directly in conflict with the decision of this Court in IN RE SUMMERS, 325 U.S. 561, insofar as the Court below failed to consider the principle enunciated in the SUMMERS Case, *supra,* which held that this Court had jurisdiction to entertain an appeal from refusal to grant Applicant allowance to practice law in State or Federal Court, or both. While the Court in IN RE SUMMERS, 325 U.S. 561, found no discriminatory purpose in the pertinent section of the Illinois Constitution (Art. 12), it rejected the contention of Petitioner in that cause. One year after the SUMMERS Case was decided, in GIROUARD v. UNITED STATES, 328 U.S. 61, it was decided that a resident alien conscientious objector could *not* be barred from national citizenship should he agree to perform non-combatant duties in the armed forces. Clearly, the GIROUARD decision cast doubt

upon the authority of the SUMMERS Case, in which the Petitioner's contention was rejected, and highlights Mr. Justice Black's dissent in the SUMMERS Case, *supra*. It is noteworthy that in the SUMMERS Case, 325 U.S. 561, Justice Black in his dissenting opinion stated that he did not believe that a man who was qualified in every respect could be barred from practicing law because he was a conscientious objector.

Clearly, imposition of an unconstitutional condition such as disagreement with unorthodox opinions and beliefs on philosophical and political questions resulting in the denial of the privilege of practicing law, should not stand.

(2). This case is important and should be resolved by this Court because the decision stemming from the Court below failed to determine the case upon its merits but rather on some vague procedural basis. This case presents a vital and fundamental question affecting the lives of all Americans. It poses the question: Is the right to practice law in the United States Courts to be denied an otherwise acceptable person simply because he holds unorthodox views? Unless the courts are prepared to answer this question, which Petitioner submits, under the circumstances, must be answered in the negative, the right and freedom of all our citizens are in jeopardy.

If this Court should fail to examine this cause on the merits and write on the subject, thus giving the Courts below a guide to follow, and thus eliminate fear and hysteria from those who pass upon the qualifications of persons seeking admission to the Federal Bar, then many of our citizens may well ask themselves: Is the Freedom then only of the "Pickwickian sort, enshrined in English doggerel",

"It's because of the magna carta
As were signed by the barons of old,
Then we may do as we please,
So long as we do what we're told."

This particular cause may affect only Benjamin G. Levy, a young man, little known, but the issue presented is of great importance to the Bar and to our Country. This Court must write and write boldly insuring the maintenance of freedom and judicious judgment in cases such as this.

(3) The question presented is of great importance in the admission of the imposition of *unconstitutional conditions* which deny the privilege of actions and freedom accorded under pertinent Amendments of the United States Constitution. This case does *not* involve, as it did in IN RE SUMMERS, 325 U.S. 561, a person who cannot take an oath to support the Constitution.

It is *not* disloyalty which has apparently prevented Petitioner's admission to the Federal Bar, but dissimilarity of opinion which he has expressed on philosophical and political matters. For this, no one should be excluded from engaging in the practice of law, the greatness of which profession has come from its unique attraction for men of intellectual independence, be they "correctly" independent or "incorrectly" independent. The charge has never been made, and cannot be made, that Petitioner is a Communist; it is that, in the opinion of one man, *his employer*, based on hearsay and newspaper gossip, is a Communist. If his employer is a Communist, it is the *Bar Committee's duty*, as it would be the duty of any good American, to present evidence that will bring the employer to justice. Mere slanderous gossip *should not* be admitted nor tolerated.

This Court in IN RE SUMMERS, 325 U.S. 561, expressly held that a justiciable controversy existed, but found no State action violating the Fourteenth Amendment in the denial of admission. The Circuit Court, in this cause, ignored this feature and proceeded on a somewhat vague procedural view. Since the advent of IN RE SUMMERS, *supra*, the New York Courts in APPLICATION OF CHARLES J. STEINBUGLER, 297 N.Y. 713, 77 N.E. 2d 16, held that a claim of exemption from military service upon conscientious and lawful grounds, without proof of insincerity or of disloyalty, was *not* evidence bearing on an applicant's character or fitness for admission to the Bar. In the instant case, there is *no* evidence of disloyalty nor does there exist any legal factor disqualifying Petitioner from being admitted to practice in the United States Courts, especially since he is a member in good standing in all of the Texas State Courts, and volunteered to be examined, under oath, upon all matters touching upon his qualifications.

(4) If so well settled and fundamental a right to the effect that imposition of conditions upon the granting of a privilege vouchsafed by the First and Fifth Amendments, as here, is to be bartered away as the price to be paid for the privilege to practice law, then all constitutional guarantees are subject to be destroyed by an indirect process, outwardly voluntary, which is, in reality, compulsory and fraught with coercion.

(5) To sustain the ruling of the Court below would be tantamount to creating a novel situation, to-wit: that one who enters the practice of law and desires to be admitted to the United States Courts having been accepted by the Courts of the State in which he lives, can be forced to sacrifice his civil rights. Thus, we revert to the plight of

the Christians under Roman rule, the oppression and annihilation of the Jew under Nazism, the infamous inquisition in Spain, and the discriminatory treatment visited upon the founders of this Nation by the intolerable policies of George III.

Conclusion

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Houston, Texas,
Counsel for Petitioner

APPENDIX A

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

First Amendment,
United States Constitution.

"No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *."

Fifth Amendment,
United States Constitution.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 14886

THE MATTER OF:

APPLICATION OF BEN G. LEVY FOR ADMISSION TO PRACTICE IN THE U. S. DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS

Appeal from the United States District Court for the Southern District of Texas

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(June 23, 1954)

Before STRUM, Circuit Judge, and DAWKINS and HOOPER, District Judges.

HOOPER, District Judge: Ben G. Levy, Appellant, filed application for admission to the Bar of the United States District Court, Southern District of Texas, and his application pursuant to Local Rules of Court was referred to a Bar Committee for investigation. After an informal investigation and upon vote of the entire Committee, an adverse recommendation was filed with the Court. Objections to this report were filed by applicant and the mat-

ter came on to be heard before three District Court Judges, who adopted the report of the Bar Committee and refused the application. As our affirmance of such order by the District Court is predicated *upon procedural grounds,* no attempt will be made to discuss fully the merits or demerits of applicant's cause.

The application for admission to the Bar was filed in accordance with Rule 5(b) of the Local Rules of the District Court, which provided among other things, that any attorney residing in the State of Texas, licensed by the District and the Superior Court of said State, and a member in good standing of the Texas State Bar "whose private and personal character shall be unexceptional" and who is competent to practice in said Court, may be admitted to the Bar in the manner provided by such rule. The rule provided that the application shall be referred to the Bar Committee and such Committee "in such manner as it may deem proper, shall make an investigation of the fitness, competency and qualifications of the applicant." It was provided the Committee "shall have the power given a Master of this Court under Rule of Federal Procedure 53, to summon witnesses, etc." It appears from the record that the procedure as to this Committee in the District Court had generally been informal and so it was in this instance.

Applicant filed his objections to the foregoing adverse report of the Bar Committee contending among other things, that the whole Committee was not present at the hearing thereon, that "the rationale behind the Committee's adverse recommendation, it seems fair to state, is the Applicant's 'association' with Morris Bogdanow, who, according to the Committee report, " * * * is generally considered to be a member of the communist party." Further, that the Com-

mittee procedure in this instance was highly arbitrary and capricious, motivated by prejudice and reliance on wholly inadmissible evidence. Thereupon the District Court set down this matter for a hearing at which hearing the following colloquy occurred:

"Judge Kennerly:

"The matter for this afternoon is that Mr. Ben G. Levy filed his application for admission to this Bar, and it was referred to the Bar Committee, and we have a report dated September 28, 1953 from that Committee.

"I am informed, Mr. Levy that under the rules the report of the Committee was regarded in the nature of a report from a Master in Chancery.

"As I understood the rules, Mr. Levy, had two courses open to him. One was to re-submit the matter to the Bar Committee for any further evidence that he thought ought to be taken, and the other was to except to the report as made. He has chosen, as I understand him, to except to the report, and we are here to hear you now Mr. Levy, on your exceptions. Do you still want to pursue that course?

"Mr. Levy:
Yes, Your Honor.

"Judge Kennerly:
All right. You may proceed."

Applicant, thereupon, not under oath, made to the judges what might be termed a declaration as to his personal and political creed, consuming more than thirteen pages of the record, to which discourse apparently the trial judges gave patient attention. Thereupon, the following colloquy occurred:

"Judge Kennerly:

"I think, Counsel, that we indicated at the beginning of the hearing that any evidence would properly be only before the Committee, and since you have chosen the other course, of excepting to the report, why, we are not confined to listen to evidence in the case. The evidence is to be taken by the Committee.

"Mr. Levy:

"Yes, Your Honor.

"Judge Kennerly:

"But we, of course, are glad to have your statement and your views about these matters."

Thereupon applicant made further statements and at his own suggestion he was carefully questioned by members of the Three Judge Court, during the course of which he disclosed his political affiliations, his liberal views, his fraternal, religious and political connections, and even his religious beliefs. When asked whether he believed in God he answered: "I believe that there is a Supreme Being, but I wouldn't venture to say what the nature of that Supreme Being is," that he did not worship in any formalized manner. He described his efforts in behalf of the defendants in the Rosenberg case. He denied any communistic connections implied from his employment by a local attorney whose reputation according to the views of the Bar Committee, was communistic.

This statement by the applicant to the Court was made at a hearing held (in open Court) at his own request, it was not under oath, and it did not alter the fact that he was then taking *exception to the report of the Committee in the nature of a report* of a Master in Chancery.

It is provided by law that a Master in Chancery, unless otherwise directed by the order of reference, shall file with his report a transcript of the proceedings, of the evidence, and the original exhibits. "The Court shall accept the Master's Findings of Fact unless clearly erroneous." Any party may serve written objections thereto. "The Court after hearing may adopt the report or may modify it, or reject it in whole or in part, or may re-commit it for further investigation." See Rule 53(e)(1)(2), Federal Rules of Civil Procedure.

The trial judges correctly followed the above rule, gave the applicant his choice of remedies thereunder, explained to him his right to have the matter re-committed to the Bar Committee for a full hearing before all members thereof, but applicant knowingly and voluntarily declined that suggestion and saw fit to rely upon exceptions to the report. Compare Goldsmith vs. Board of Tax Appeals, 270 U.S. 117.

Applicant seems to take the position that he was being tried by the Bar Committee on charges preferred against him, *overlooking the principle that the burden of proof was on him pursuant to the Local Rule aforesaid, to show that his private and personal character was unexceptional.*

He concedes that he has no constitutional right to practice law, that that is a matter of privilege. This principle of law is so well established that it does not require discussion. See 7 C.J.S., p. 708. It is interesting to note that recently the Circuit Court of Appeals for the District of Columbia has ruled that the refusal of the District Court to grant such an application is an administrative function and it is not appealable. Brooks vs. Laws, 208 F. 2d 18.

The District Judges in this instance did not permanently close the doors of the court to the admission of Appellant,

but expressly reserved to him the right within twelve months thereafter, to renew his application. The record evidences the apparent purpose upon the part of the District Judges to deal fairly with the applicant. All presumptions of regularity must be entertained by this Court concerning the report of the Bar Committee and the order of the Judges. Applicant was expressly offered the privilege of making a record upon which he could appeal, but declined to do so.

The order of the District Court Judges denying his application is AFFIRMED.

A True copy:
Teste:

Clerk of the United States Court of
Appeals for the Fifth Circuit.